BEFORE THE
DEPARTMENT OF COMMERCE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
AND
DEPARTMENT OF AGRICULTURE
RURAL UTILITIES SERVICE

In the Matter of	)	
American Recovery and Reinvestment Act	)	Docket No. 090309298-9299-01
Broadband Initiative	)	

COMMENTS OF THE CITY OF PALO ALTO, CALIFORNIA

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EXECUTIVE SUMMARY

Palo Alto is located in the heart of the Silicon Valley, the nation's and the world's preeminent high technology center. Yet even Palo Alto's businesses, residences and high-tech educational, medical and innovation centers lack access to the truly high-speed broadband capability that is needed to maintain Silicon Valley's, and the nation's, competitive world leadership in the high-tech and bio-tech sectors. Private incumbent providers have failed to meet that need. Responding to demand from City residents and businesses, Palo Alto has built a fiber ring and would be prepared to move forward promptly with a fiber-to-the premises ("FTTP") project if sufficient funds were available for it to do so.

Palo Alto strongly encourages the NTIA to frame BTOP implementation, application and evaluation criteria in a way that available funds can be used not only to promote deployment of broadband services to unserved areas, but also to "raise the bar" in the nation's critical high-technology centers that are underserved in terms of their unique broadband needs and which are essential to the nation's international competitiveness and job growth. That will necessarily mean a sliding scale definition of "underserved areas." The goal in the nation's high-technology corridors should be to "raise the bar" to a minimum broadband speed of no less than 50 Mbps, with symmetrical 25 Mbps upstream and downstream service.

Palo Alto also urges the NTIA to structure BTOP eligibility and application evaluation criteria in a manner that (1) encourages applications by municipalities and their utilities, as well as public/private partnerships involving municipalities and their utilities; (2) does not reward incumbent private providers; (3) requires that grant applicants receiving BTOP network deployment support must operate genuinely open, and non-discriminatory, broadband networks; (4) takes into account the unique financing requirements and limitations applicable to municipalities and their utilities; and (5) promotes new broadband competition to incumbent telephone and cable companies.

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The City of Palo Alto, California ("Palo Alto" or the "City"), submits these comments to the Department of Commerce, National Telecommunications and Information Administration ("NTIA"), and to the Department of Agriculture's Rural Utilities Service ("RUS") in response to the Joint Request for Information and Notice of Public Meeting ("Joint Request for Information") regarding the broadband initiatives of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 11-5, 123 Stat. 115 (2009) ("ARRA").[1]

I. INTRODUCTION.

Palo Alto is a community of approximately 63,000 residents with a daytime population exceeding 125,000. Palo Alto delivers a full range of municipal services, and its Utilities Department ("CPAU") operates eight utilities serving over 28,000 electric, gas, water, wastewater treatment, wastewater collection, refuse, storm drain and fiber optic customers. Palo Alto also acts as the administrator of a six-agency local cable franchising authority in lower San

[1] *American Recovery and Reinvestment Act of 2009 Broadband Initiatives*, Joint Request for Information and Notice of Public Meetings, 14 Fed. Reg. 10716 (Mar. 12, 2009).

Mateo and upper Santa Clara Counties, California, that has developed a broadband institutional network serving educational and public institutions in the local area.

Palo Alto is located in the heart of the Silicon Valley, the nation's and the world's pre-eminent technology center. It has long been a marketplace for Internet entrepreneurship and innovation and home to the world's largest collection of technology companies. It is known for its venture capital prominence and enjoys international name recognition for its educational and medical excellence. The Palo Alto area is home to such innovative companies as Google, Hewlett-Packard, and Facebook. Travelers from all over the world come to Palo Alto for purposes of education or research at Stanford University, training or business with the high technology firms of the Stanford Research Park, or medical care at the VA Palo Alto facility ("VA Hospital"), the Lucille Packard Children's Hospital, and the Stanford Medical Center.

Palo Alto is a critical cornerstone for a new national broadband strategy and is uniquely situated to lead this nation in worldwide competition in high technology and in deploying affordable state-of-the-art broadband infrastructure. Palo Alto would serve as an ideal beta test site that other jurisdictions throughout the nation can emulate in rolling out their own broadband networks.

With appropriate economic stimulus support, Palo Alto is ready to embark on a broadband project promptly, resulting in immediate economic benefits in terms of jobs and infrastructure. Moreover, due to Palo Alto's unique role in the new worldwide Internet economy, it is critical to the future of U.S. international competitiveness that Palo Alto businesses and residences should be served with genuine, high capacity, fiber-to-the-premises ("FTTP") broadband service.

Unfortunately, that is not the case today. Palo Altans currently can purchase Internet access service from two providers – either through DSL offered by the local phone company or cable modem service from the cable company – offering maximum broadband speeds of only 16 megabits/second ("Mbps") downstream, and only 2 Mbps upstream. The absence of strong competition has not yielded sufficient broadband quality, speed and affordability. Many in the Palo Alto community, including high-tech industry business leaders, entrepreneurs and local residents, have bemoaned the lack of advanced high-speed broadband facilities at affordable prices. Palo Alto's Internet-related businesses have been clamoring for robust broadband so they can invest in the development of transformational technologies and applications.

Because the private sector has failed to provide universal high-bandwidth broadband even to such a sophisticated and desirable market as Palo Alto, the City has sought to pursue that goal itself. A decade ago, Palo Alto took the first step in its quest to become a "City of the Future" by building its own dark fiber backbone, the critical infrastructure that would support a 21st Century local and regional economy. Since that time, Palo Alto has attempted twice to implement its vision of a new information super highway that would provide universal and affordable fiber-based broadband to every premise in Palo Alto. Like many other municipalities across the nation, however, to date Palo Alto has been unable to obtain sufficient funding to construct this much-needed infrastructure.

At present, evidence of the shrinking economy is abundant in Palo Alto. Several of Palo Alto's major revenue sources have been affected by the dramatic change in the local and national economy. Rising unemployment, declining consumer confidence and the erosion of corporate profitability will continue to impact local revenues. Santa Clara County's unemployment rate has risen steadily to 7.1% in November 2008. Retail and office vacancy rates have grown to

10.8%, home prices have declined, and home sales have slowed. These and other factors, such as the breakdown in the municipal bond market, impede the ability of local governments like Palo Alto to obtain the financial resources needed to revitalize their infrastructure.

Federal support for broadband in Palo Alto would afford Silicon Valley the opportunity to continue to be a national, indeed international, center of innovation, economic growth, job creation, educational opportunities and global competitiveness. Promoting the economic health and growth of Palo Alto, and Silicon Valley generally, through modern state-of-the-art FTTP infrastructure will be critical in lifting our economy out of its economic malaise and ensuring America's future international competitiveness.

A. History of Broadband in Palo Alto.

In 1997, CPAU installed a 41-mile fiber "backbone" that the City viewed as a stepping stone toward fiber connection to every commercial and residential premise in the City. This vision of a universally fiber-connected City in which Internet data could flow at 100 Mbps, upstream and downstream, would provide enormous benefits to its citizens and businesses, and to the national and regional economies. Unfortunately, the extensive capital costs, estimated at around $45 million, to extend the City's fiber backbone to a last-mile FTTP network have been an as-yet insurmountable obstacle to the City's goal.

Several attempts to marshal the capital needed have not succeeded. In 1999, the City issued a Request for Proposals ("RFP") to attract private investors, but this failed either for lack of sufficient bidder capitalization or because firms lacked the experience and expertise to execute. The City then conducted, at its own expense, a FTTP trial and connected 65 homes to its backbone. The trial gave the City valuable experience with the benefits, costs and risks of installing and operating a FTTP network. This trial proved technologically feasible and was embraced by Palo Alto residents. Palo Alto businesses and residents could see that there was an

alternative to the expensive, slow, and, at times, unreliable Internet access service provided by the incumbent telephone and cable companies. Based on its FTTP trial, the City developed an internal business plan in 2002 to determine whether it could provide complete a FTTP network and provide data, telephony, and video services to all businesses and residents. Because of the fledgling market for telecommunications bonds and the high rate of return expected by private investors for their risk (fifteen to twenty percent), the City had to table the plan.

In 2007, the City again issued an RFP for private companies to build and operate a FTTP network. The proposed business model of one bidder to the RFP, which is currently implementing business plans for consortia operating in France, Canada, and Singapore, called for a public-private partnership, whereby the City would contribute anywhere from thirty to fifty percent of the required capital. While Palo Alto is willing to leverage its existing dark fiber assets in a public-private partnership, it cannot raise the substantial amounts of capital that private sector parties wishing to participate in such a public-private partnership have required the City to provide. Moreover, the economic downturn has restricted private parties' ability to obtain their own financing for the project. Palo Alto's negotiations with the successful RFP bidder have terminated, as the bidder has withdrawn its proposal due to the City's inability to make a sizable capital contribution. The City remains optimistic, however, that a public-private partnership arrangement will be reached, as the bidder has continued to express interest in assisting the City in a consultant or contractor capacity.

After considerable research, it has become apparent to the City that the private sector alone cannot be relied upon to furnish universal high-speed broadband deployment, even in a cutting-edge city like Palo Alto. To recoup capital costs, the private sector, in the main, has focused on commercial and high-income areas with solid economic bases. This has caused

avoidance of lower income areas. Equally important, dominance by incumbent telephone and cable companies has also dulled the incentive to invest in new system architectures. This approach has resulted in high prices for relatively slow-speed services, especially when compared to other developed nations. This is a very shortsighted result. These are among the reasons that the United States is losing its technological and economic competitive edge to countries with more robust, widespread and affordable high bandwidth service.[2]

Especially given current economic conditions, federal funding will be required to move all of our citizens into the future of high-speed broadband. It is equally clear that reliance n existing incumbent private providers will not be sufficient. Municipalities and public-private partnerships have a critical role to play. Accordingly, the Broadband Technology Opportunities Program ("BTOP") must favor grant assistance to municipalities and public-private partnerships, rather than private sector incumbent providers.

B. Broadband Deployment Plan.

With adequate funding support, Palo Alto is ready to deploy a FTTP network that passes all homes and businesses in the City, and to do so rapidly. The network would be constructed by expanding CPAU's existing multiple loop, 41-mile fiber backbone that surrounds the entire City. Building off of the fiber ring increases the speed with which the City can commence system construction and complete the project.

Palo Alto is prepared to begin construction of a FTTP network within 90 to 120 days of funding commitment, and the City plans to roll out the project in phases over a two-year time period. Several hundred new jobs would be created in the construction, engineering and information technology fields to support construction and operation of the City's FTTP network.

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[2] *See, e.g.*, Org. for Econ. Co-Operation and Dev., "OECD Broadband statistics" (June 2008), *available at* http://www.oecd.org/dataoecd/21/60/39574903.xls.

Palo Alto would construct a world-class FTTP network capable of delivering a minimum bandwidth of 100 Mbps symmetrical service to its approximately 23,000 residential and 5,000 business premises. The symmetrical design of Palo Alto's FTTP network would deliver data streams at the same speed in both upstream and downstream directions, enabling every network user to be a source of information and exchange and innovative new applications.

The City's FTTP network would be operated on an open access standards-based platform that would promote competition among multiple content and application service providers. Palo Alto's network would follow the principle of net neutrality, treating all traffic equally without imposing higher tolls for certain kinds of content or services.

The network would be designed to support a full range of voice, video and data services. It would also accommodate services such as data backup and storage, streaming audio, security, telehealth and teleeducation. In addition, it would provide a backbone that would be used to implement Palo Alto's energy management, smart grid and wireless system initiatives.

FTTP network construction costs are expected to total $65 million, or $1,607 per premise passed. This figure assumes the network would pass 100 percent of the homes and businesses in Palo Alto and would include connections to 50 percent of the premises. This cost includes the cost of labor, electronics, customer drops, and network software. Palo Alto has set aside cash reserves of approximately $5 million to cover network operating costs until the system is able to generate enough revenue to meet annual expenses. These costs include sales and marketing expenses, inbound call center, bill and payment processing, network operations center, installation, and network repair and maintenance costs. Palo Alto anticipates that by Year Five of the project, revenues will begin to cover operating expenses.

The City anticipates that it would need BTOP grant funding in the amount of $45 million to fund the construction of its FTTP network.

C. Benefits of an FTTP Network.

Connecting the Palo Alto community to ultra high-speed broadband will bring remarkable economic, social, cultural and other benefits not only to Palo Alto, but to surrounding Silicon Valley communities like Stanford, Menlo Park and East Palo Alto, and the nation as well. More competition will result in lower prices and improved service quality for consumers. New services and applications will emerge to improve citizen's lives and make Palo Alto and surrounding communities a more attractive place to live, work and invest. It also will serve as a launching pad for entrepreneurial innovation in the Silicon Valley that will spur the nation's international competitiveness. Not only will it revolutionize broadband Internet service; it will allow us to address the critical challenges that face our community and our nation. These include economic growth, job creation, international competitiveness, healthcare, education, energy consumption, environmental protection and public safety.

Affordable high-speed Internet service is crucial to stimulating economic growth and international competitiveness in Palo Alto and the greater Silicon Valley, which is a keystone to our nation's future global competitiveness. Affordable, universally available high-speed broadband service will stabilize and expand Palo Alto's industrial and commercial base, preventing future migration to other, often international, markets that offer broadband services at better prices and with higher capacity. With a connected community, more high-tech, bio-tech and other businesses will be lured not only to Silicon Valley, but to the U.S.

Palo Alto is home to a number of medical and bio-medical facilities of national stature, and a FTTP network could thus provide a test bed for revolutionary health care advances and reducing healthcare costs. Using broadband in the provision of healthcare can revolutionize

medical treatments. Telehealth technologies can remotely monitor patients, facilitate the collaboration between medical professionals, and the exchange medical data and images. Robust broadband will enable the monitoring of chronic illnesses, improved access to medical specialists, and reduced travel to and among medical offices and hospitals.

Educational opportunities in Palo Alto will be enhanced with access to universal broadband technology at school and at home. Palo Alto is also adjacent to Stanford University, one of the most prestigious institutions of higher education in the world. Stanford has produced much of the talent that founded many successful high-tech companies in Palo Alto and the greater Silicon Valley. A state-of-the-art broadband system would enable Stanford students and faculty to better connect with other world-renowned institutions, letting students and faculty interact with leading experts in scientific, technology, medical and engineering fields.

Palo Alto welcomes the opportunity to comment on the implementation of the ARRA's BTOP initiative. Palo Alto also commends the NTIA and RUS for hosting the many public meetings where divergent views on how to implement the broadband initiatives were vigorously discussed.

While the ARRA provides significant funding for broadband deployment through NTIA's BTOP grants and through the RUS grants and loans program, the funding allocated is not sufficient to meet the nation's broadband needs. Thus, both NTIA and RUS have an enormous responsibility in administering their respective programs to ensure that the programs not only comply with the statutory requirements and purposes, but that they maximize broadband deployment, access and connectivity, including high-speed broadband deployment. Maximizing broadband will also necessarily spur the job creation and economic recovery intended by the

ARRA. And maximizing broadband will enable America to retrain and increase its competitiveness in a global market.

II. NTIA BTOP IMPLEMENTATION.

The NTIA asks for information regarding BTOP grant purposes, eligibility, criteria and other areas related to the processes it will follow in implementing the program and awarding grants. NTIA also asks for information on post-award grant monitoring and on how to measure the BTOP's success. Palo Alto will focus its comments on the questions revolving around the application and awarding of grants processes.

A. BTOP Purposes.

The Conference Report accompanying the ARRA states that "(t)he Conferees intend that the NTIA award grants serving all parts of the country, including rural, suburban, and urban areas."[3] The BTOP enumerates five specific purposes:

> (1) provide access to broadband service to consumers residing in unserved areas of the United States;
>
> (2) provide improved access to broadband service to consumers residing in underserved areas of the United States;
>
> (3) provide broadband education, awareness, training, access, equipment, and support to—
>
> > (A) schools, libraries, medical and healthcare providers, community colleges, and other institutions of higher education, and other community support organizations and entities to facilitate greater use of broadband service by or through these organizations;
> >
> > (B) organizations and agencies that provide outreach, access, equipment, and support services to facilitate greater use of broadband service by low income, unemployed, aged, and otherwise vulnerable populations; and
> >
> > (C) job-creating strategic facilities located within a State-designated economic zone, Economic Development District designated by the Department of Commerce, Renewal Community or Empowerment

[3] H.R. Rep. No. 111-16, at 774 (2009) ("Conf. Rep.").

Zone designated by the Department of Housing and Urban Development, or Enterprise Community designated by the Department of Agriculture;

(4) improve access to, and use, of broadband service by public safety agencies; and

(5) stimulate the demand for broadband, economic growth, and job creation.[4]

While all the enumerated purposes are important, for Palo Alto and similar communities across the nation, the key purposes are providing improved access to broadband in underserved areas and to schools, libraries and healthcare providers and for disadvantaged groups; improving broadband use by public safety agencies; and stimulating broadband demand, economic growth and job creation.

The NTIA asks several questions regarding the BTOP purposes, including whether there should be percentages of funds apportioned for each of the five purpose categories. Palo Alto does not believe, and thus does not advocate, that there should be fixed percentages allotted, as all of the categories are important and in many instances the purpose categories overlap. For instance, providing access to consumers residing in underserved areas (Purpose 2) would overlap with Purposes 3(A) and (B) (improved access for libraries, schools and healthcare facilities and to disadvantaged groups), 4 (use of broadband by public safety), and 5 (stimulating demand and economic growth).

NTIA should have the discretion and flexibility to apportion the grant money among the most worthy grant applications and not arbitrarily apportion the funding by ARRA "purpose" category. Had Congress intended these categories to be funded by rigid percentages or a set formula, it could have said so, but it did not. Instead, Congress specified that certain minimal funding be awarded to two types of BTOP program grants (the competitive grants for expanding

[4] ARRA, Sec. 2, Div. B, Title VI, § 6001(b), 123 Stat. at 512-513.

public computer center capacity and the competitive grants for innovative programs to encourage sustainable adoption of broadband service), but it left the larger share of the funds for BTOP for broadband deployment grants.[5] Palo Alto agrees that applicants should be encouraged to address more than one BTOP purpose category (and, as noted above, the City expects that most applications will encompass at least two BTOP purposes), but only to the extent it fits with the particular applicant's community broadband needs.

NTIA should keep in mind, however, that to the extent many unserved areas are rural, they will be covered by the RUS program. NTIA should therefore be careful to coordinate with RUS so that total broadband grant program funding is not over-allotted to rural areas. Our nation's urban and suburban areas are also in great need of much more true, high-capacity broadband infrastructure, a need that BTOP must decisively answer today.

B. <u>The Role of The States</u>.

The ARRA provides that the NTIA may consult with the States with respect to identifying unserved and underserved areas in the particular State, and as to the allocation of grand funds in the State.[6] The NTIA asks, among other questions, how the grant program should consider State priorities in awarding grants and what is the appropriate role for States in the NTIA's implementation and awarding of grants under BTOP. The NTIA received extensive feedback on this question at the NTIA/RUS public meetings, including at the ones held on March 17, 2009, and on March 23, 2009.

The NTIA should consult with States to the extent practicable, as States in some instances may be better positioned to understand their particular communities' broadband needs. The NTIA should *not*, however, accord exclusive or substantial weight to a State's endorsement

[5] ARRA, Sec. 2, Div. A, Title II, 123 Stat. at 128.
[6] ARRA, Sec. 2, Div. B, Title VI, § 6001(c), 123 Stat. at 513.

of a particular project. Nor should States be given the authority to rank or prescreen all applications within their jurisdictions, as the National Governors Association and NARUC have urged.[7] The ARRA allows (but does not require) the States to have a consultative role, but not more. NTIA cannot, and should not, abdicate or otherwise delegate its statutory responsibilities both to develop the BTOP grant application criteria and to make the ultimate decisions in awarding the grants.

Relying on the States, and in particular state public utility commissions ("PUCs"), could pose special problems and risks for cities with municipal utilities like Palo Alto. The reason is that, under many state laws (including California's), municipal utilities are exempt from state PUC jurisdiction. As a result, state PUCs are likely to be wholly unaware of the interests and needs of communities served by municipal utilities. State PUCs are therefore not well positioned to evaluate grant applications by municipal utilities vis-à-vis grant applications by the state PUCs' private sector regulatees, especially incumbent telephone companies. We do not suggest that state PUCs would be deliberately biased against municipal utility grant applications, but an inevitable result of a state PUC's adherence to its State law jurisdictional limitations would be an unwitting built-in, institutional bias in favor of those providers that the state PUC regulates, a bias that would be unrealistic for the NTIA to expect state PUCs to overcome, assuming that they would be permitted to do so under State law. And the experience under California's Advanced Services Fund ("ASF") grant program tends to confirm this conclusion. In dollar terms, most grants have gone to private sector incumbent providers that are entities regulated by

[7] NTIA/RUS public meeting transcript, Roundtable on the Role of States, Session 2 (Mar. 23, 2009), *available at* http://www.ntia.doc.gov/broadbandgrants/meetings.html. *See also* NARUC letter to the Department of Commerce, the Department of Agriculture and to NTIA (dated Apr. 2, 2009), *available at* http://www.naruc.org/policy.cfm?c=advocacy.

the California PUC.[8] Incumbent preferences of this nature do not serve the ARRA's goal of promoting competition in broadband service, thereby lowering prices.[9]

Moreover, having state PUCs review all BTOP applications would make the application process more cumbersome and delay the timely awarding of grants. In addition, state PUCs are not typically chartered to be in the grant application evaluation business and therefore have no more (and likely less) experience than NTIA in that area. Accordingly, while Palo Alto believes the NTIA should welcome input from the States, it should not permit the States' role to be decisive, and it should independently review and evaluate all applications from a particular State, regardless of the views of that State.

C. Private Entity Eligibility Should Be Limited– the NTIA Needs to Give the "Public Interest" Standard Meaning.

The ARRA provides that private broadband service or infrastructure providers may be eligible for BTOP grants, but only to the extent that the NTIA finds by rule that it is in the public interest.[10] The NTIA asks what standard it should use in doing so.

Palo Alto urges the NTIA to give meaning to the statutory "public interest" requirement. At the NTIA public roundtable devoted to private entity eligibility, Curt Stamp, the representative of the Independent Telephone and Telecommunications Alliance, proposed that any entity with an existing FCC license, state certificate of convenience and public necessity, local franchise or other government license be automatically eligible to apply.[11] Debbie Goldman, representing the Communications Workers of America ("CWA") agreed.[12] Grant

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[8] *State Telecom Activities*, Comm. Daily, Mar. 16, 2009, at p. 8 (CPUC awards $507,000 of $728,000 matching ASF grants to AT&T).
[9] *See* ARRA, Sec. 2, Div. A, Title I, 123 Stat. at 118.
[10] ARRA, Sec. 2, Div. B, Title VI, § 6001(e)(1)(c), 123 Stat. At 513.
[11] NTIA/RUS public meeting transcript, Roundtable on Private Sector Eligibility, Session 1, Comments of Curt Stamp at 5 (Mar. 16, 2009), *available at* http://www.ntia.doc.gov/broadbandgrants/meetings.hmtl.
[12] *Id.* at 6-7 (Comments of Debbie Goldman).

Seiffert, representing the manufacturing sector, went further, and urged that *all* private entities be eligible to apply for BTOP grants.[13]

Palo Alto strongly disagrees with those three roundtable participants and urges that automatic eligibility *not* be given to any private entity that holds a government license, certificate of public convenience and necessity, or a franchise, and that eligibility *not* be given in any blanket fashion to private entities. As one public commenter stated at the March 16, 2009, roundtable, if Congress had intended for government licensees to be so readily eligible, it could have said so, but it did not.[14] Moreover, making private providers holding government licenses, certificates, or franchises eligible without any further showing of public interest would have the effect of favoring incumbents over new entrants (whether municipal or private sector), contrary to the Act's preferences for municipal participation and for increased competition and increased affordability of broadband. Favoring incumbent private providers also would inherently increase the risk that grants would be made for projects that would have occurred without the grant funding, again contrary to the ARRA's objective. NTIA must require that to be eligible, private entities make a specific, individualized, public interest showing.

At the eligibility roundtable, D.C. Public Service Commission Chairwoman Betty Ann Kane endorsed the idea that a private entity could meet the public interest standard if it was partnering with a State in applying for funding.[15] Palo Alto would agree, if that principle is extended to private entities that partner with local governments. Sasha Meinrath, a panelist representing The New America Foundation, cautioned that if "partnerships" are to be a public interest factor, then that should only be so for "true" partnerships with full shared ownership,

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[13] *Id.* at 11-13 (Comments of Grant Seiffert).
[14] *Id. See* public comments section.
[15] *Id.* at 9-11 (Comments of Betty Ann Kane).

accountability and control for initiatives.[16] NTIA should consider the public/private partnership concept as well as other specific and measurable options in crafting a public interest rule. Palo Alto strongly recommends, however, that municipal utility and public/private partnerships be given priority weighting over private sector applicants, especially incumbent private providers (unless they partner with a State or local government).

D. Selection Criteria for Grant Awards Should Remain Flexible and Inclusive.

How the NTIA structures and weighs the BTOP grant awards criteria is critical. At the outset, Palo Alto notes that the BTOP statutory criteria are broad and include consideration of whether an application to deploy infrastructure in an area -

a. will, if approved, increase the affordability of, and subscribership to, service to the greatest population of users in the area;

b. will, if approved, provide the greatest broadband speed possible to the greatest population of users in the area;

c. will, if approved, enhance service for health care delivery, education, or children to the greatest population of users in the area; and

d. will, if approved, not result in unjust enrichment as a result of support for non-recurring costs through another Federal program for service in the area;[17]

Palo Alto believes that these criteria should be applied flexibly and as befits the applicant's particular territory and circumstances. In areas with no broadband service, projects that improve affordability and subscribership to the greatest population of users may be more important than projects that provide the greatest possible speed to the greatest population of users. But, in other areas, like Palo Alto, that have some basic broadband availability but in which entrepreneurial residents, businesses, universities, health care facilities and other

[16] *Id.* at 8-9 (Comments of Sasha Meinrath).
[17] ARRA, Sec. 2, Div. B, Title VI, § 6001(h), 123 Stat. at 514-515.

institutions demand and are in need of much higher-speed broadband services, projects that provide the greatest speed will be more vital. In such markets, the additional competition provided by a new entrant offering truly advanced high-speed service will also promote the criteria of increased affordability, both directly from the new entrant, and by forcing incumbent operators to increase broadband speed and/or to improve the price/speed value packages they offer.

NTIA asks numerous questions regarding grant criteria, including whether priority should be given to proposals that leverage other ARRA projects. While Palo Alto agrees that leveraging should be encouraged to the extent it fits a particular applicant's needs, the fact that an applicant can leverage other ARRA project funding should not move that particular applicant ahead of others in the funding line. As many have estimated, the potential pool of applicants for BTOP and RUS program grants is in the thousands. The applicant pool will also be diverse, given the nation's geographic, demographic and socio-economic mix. Leveraging would tend to encourage larger projects over smaller ones, which we do not think the BTOP should do. A particular applicant should not be sent to the back of the funding line because its application covers a small area that makes ARRA project leveraging less likely. All of the BTOP purposes are important, and given the ARRA's broad purposes and Congress's policy goals, every application should be evaluated based on its particular circumstances and merits.

Palo Alto also urges NTIA to reject criteria or priorities that have no basis in the statute and that may narrow the NTIA's flexibility in awarding grants. As one example, CWA has urged that priority in funding should be given to states that have mapping, infrastructure and technology plans in place. The BTOP statutory provisions nowhere mention such a priority. Moreover, most state broadband mapping programs tend to focus on identifying unserved areas,

rather than accurately identifying underserved areas. As a result, current state mapping may prove of little use, or even counterproductive, in identifying underserved areas.

E. In Evaluating Municipal Applicants, NTIA Must Take Note of Referendum and Other Municipal Financing Requirements.

To meet its contribution obligation for a broadband project application, many municipalities or their utilities will need to issue bonds and/or to impose a new fee on residents to help pay for the project. In many jurisdictions, state law may require a municipality or a municipal utility to obtain referendum or other voter approval prior to issuing bonds or imposing a new fee on residents. Implementing referendum and bond requirements, of course, takes time and money. Given the ARRA's clear intent that municipalities are and should be eligible for BTOP broadband grants without any separate public interest showing,[18] the 20% matching requirement should not be construed to impose special handicaps on municipal grant applicants vis-à-vis private sector applicants. The municipal bond handicap is no small one, especially in light of the current difficulties in the municipal bond market, which the ARRA elsewhere tries to ameliorate.[19]

NTIA therefore should construe the 20% matching requirement flexibly with respect to municipal grant applicants. NTIA should not require municipal applicants to have obtained any state law-required referendum approved or to have issued municipal bonds as a condition to satisfying either the 20% matching requirement or the financial qualifications requirement. Doing otherwise would, as a practical matter, make it extraordinarily difficult for municipal grant applicants to qualify.

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[18] ARRA, Sec. 2, Div. B, Title VI, § 6001(e), 123 Stat. at 513.
[19] *See* ARRA, Sec. 2, Div. B., Title I, Subtitle F, Part I, §§ 1501-1503, 1213 Stat. at 353-355, and Part IV, § 1531, 123 Stat. at 358-360.

Further, the NTIA should favorably consider granting waivers of the 20% matching requirement to municipal grant applicants where the necessary funding is contingent on subsequent events, such as referendum or other voter approval or bond registration and issuance. To prevent abuse, NTIA could make such waivers conditional, with the applicant being granted 100% financing on condition that the applicant agree to repay to NTIA any amount of the funding exceeding 80% of the cost of the approved project. That would give the municipality the needed time to fulfill state law referendum or other voter approval or bonding requirements while, at the same time, making sure that, at the end of the project, the federal broadband grant only effectively covers 80% of the project and the municipal applicant effectively satisfies the 20% matching requirement.

Alternatively, the NTIA should tentatively award a grant to a municipal applicant that is relying on subsequent referendum or other voter approval and/or bonding requirements, subject to the successful completion of those requirements by the tentative municipal grant awardee. The grant contract would be executed only after applicable referendum or other voter approval and bonding requirements are fulfilled, and the two-year date for substantial completion of the project would run from the date the grant contract is executed, after any referendum or other voter approval and bonding requirements are fulfilled.

F. Non-Discrimination and Network Interconnection Obligations.

The ARRA requires NTIA, in coordination with the FCC, to develop "non-discrimination and network interconnection obligations that shall be contractual conditions of grants awarded under [BTOP], including, at a minimum, adherence to the principles contained in the [FCC's] broadband policy statement (FCC 05-15, adopted August 5, 2005)."[20]

[20] ARRA, Sec. 2, Div. B, Title VI, § 6001(j), 123 Stat. at 515. Note that the ARRA incorrectly cites the broadband policy statement as FCC 05-15; the Policy Statement issued *In the Matter of Appropriate Framework for Broadband*

Thus, the ARRA makes the FCC's *Broadband Policy Statement* principles the floor, but *not* the ceiling, with respect to what non-discrimination and network interconnection obligations must be imposed on all BTOP grantees.

Palo Alto believes and thus advocates that the BTOP non-discrimination requirement must go beyond the FCC's current *Broadband Policy Statement* principles to include an explicit non-discrimination requirement. BTOP grant recipients must not unreasonably discriminate among Internet content, application or service providers, in terms of access, or rates and terms of access, to the grant recipients' network. The BTOP non-discrimination requirement should also make clear that grant recipients are not prohibited from engaging in reasonable network management practices, and that recipients may make reasonable classifications in rates, terms and conditions of access, as long as those classifications are reasonable and each classification's access terms are non-discriminatorily available to all that fall within the classification.

Imposing a genuine non-discrimination, or "open" access condition on BTOP grant recipient networks is critical to serve the ARRA's goals. Open networks are inherently better suited to the promotion of increased diversity among competing applications and content providers over a broadband network. That, in turn, will increase the attractiveness, and demand, for broadband services.

G. Scoring Criteria for BTOP Grant Applications.

Palo Alto generally supports Free Press's "Suggested Scoring Criteria for BTOP Broadband Infrastructure Deployment Grants."[21] In particular, Palo Alto supports Free Press's proposed method for the awarding of points for competition and for broadband speed level. Palo

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Access to the Internet Over Wireless Facilities, adopted Aug. 5, 2005, is FCC 05-151 ("*Broadband Policy Statement*").

[21] Those scoring criteria may be found at http://www.freepress.net/files/Scoring%20Criteria%20for%20BTOP%20Grants.pdf.

Alto also agrees with Free Press that NTIA should not use a "cost-per-customer-served" figure as an evaluation criteria, because it would unduly favor incumbent private providers.

H. Definitions – Underserved Areas.

NTIA asks a series of questions regarding definitions, including how to, in consultation with the FCC, define "unserved" and "underserved" areas. Palo Alto will focus on issues relating to "underserved" areas.

As an initial matter, Palo Alto agrees with Free Press that the NTIA should draw no distinction between "unserved" and "underserved" areas in evaluating BTOP applications.[22] Once an area qualifies as meeting either definition, NTIA should give no preference to one over the other in evaluating BTOP grant applications.

With respect to the definition of "underserved" areas, Palo Alto believes that "underserved" should be defined as a sliding scale in terms of available broadband speed. In areas where DSL or cable modem service is available, "underserved" should be defined at a higher level, and measured in terms of both total bandwidth and upstream and downstream bandwidth. Palo Alto suggests that in any area that, like the City, is a high technology center and a center of higher education and health care, "underserved" should be defined as any area where available broadband service is less than 50 Mpbs, and does not offer symmetrical 25 Mbps upstream and downstream service.

This is fully consistent with the ARRA's goals and critical to increasing the nation's international competitiveness. As noted in Part I, Palo Alto is a cradle of broadband application and content innovation. But Palo Alto is not alone in that category.

[22] *See* http://www.freepress.net/node/49132 (prepared testimony of S. Derek Turner before NTIA/RUS hearing on March 24, 2009).

Unless Palo Alto and other critical high technology areas in the U.S. like it have genuine next-generation, ultra high-speed broadband service available ubiquitously, they will truly be "underserved" by any normal meaning of the term. Entrepreneurial activity in such areas is and will continue to be the key to creating new 21st Century industries, and thus new jobs. In terms of spurring job growth and increasing our nation's international competitiveness, not just in Palo Alto and the greater Silicon Valley, but across the nation, the BTOP must be used in part to bring our nation's technology centers up to par with technological centers around the world with which we as a nation compete.

Palo Also does not suggest or mean to suggest that "underserved" should mean 50 Mbps everywhere across the nation, nor is Palo Alto suggesting that providing grant support to "unserved" areas is not important. On the contrary, bringing as much of America as possible up to a baseline level of broadband bandwidth that would enable America to compete in the 21st Century is crucial.

What Palo Alto does mean to suggest, however, is that merely bringing or improving broadband service across the nation up to some uniform baseline level is *not* sufficient to fulfill the ARRA's goals or the national interest. It would be shortsighted for NTIA to fail to also use the BTOP to usher in broadband speed levels in our nation's technology centers up to a level that will keep them, and thus our nation, on top for years to come. Our long-term financial health, productivity and industriousness, intellectual and international stature and competitiveness, and thus our nation's jobs, depend on that.

III. CONCLUSION.

NTIA must set its sights high, if not at the highest level, in implementing BTOP. The program provides a unique opportunity to serve as a catalyst for the nation to catch up with many

other developed nations in terms of broadband infrastructure. It is an opportunity that NTIA must fully exploit by implementing BTOP in a wise and forward-thinking manner.

Palo Alto strongly encourages NTIA to frame BTOP implementation, application and evaluation criteria in a way that available funds can be used both to promote the deployment of high-speed broadband services to unserved areas of the nation *and* to "raise the bar" in critical high technology centers of the nation that are underserved in terms of their unique broadband needs. That will necessarily mean a sliding scale definition of "underserved" areas. The goal should be to "raise the bar" significantly, in terms of broadband speed, in underserved high-technology areas.

Palo Alto also urges NTIA to structure BTOP eligibility and application evaluation criteria in a manner that (1) encourages applications by municipalities and their utilities, as well as public/private partnerships involving municipalities and their utilities, and that does not reward incumbent private providers; (2) requires that networks receiving BTOP support be genuinely open networks; (3) takes into account the unique financing requirements and limitations applicable to municipalities; and (4) provides new broadband competition to incumbent telephone and cable companies.

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